United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

74-1210, 74-1263, 74-1266, 74-1354 and 74-1438

United States Court of Appeals

For the Second Circuit

Docket Nos. 74-1210, 74-1263, 74-1266, 74-1354 and 74-1438

In the Matter of the Complaint

of

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability,

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BINGHAM & COMPANY, *et al.*,

Plaintiff-Appellant,

against

THOS. & JNO. BROCKLEBANK LTD.,

Defendants-Appellees.

KELLER INDUSTRIES, INC.,

Plaintiff-Appellant,

against

THOS. & JNO. BROCKLEBANK LTD., CUNARD-BROCKLEBANK LTD., COMPANIA NAVIERA EPSILON, S.A., S.G. EMBIRICOS LTD. and the S.S. NICOLAOS S. EMBIRICOS,

Defendants-Appellees.

BRIEF OF COMPANIA NAVIERA EPSILON, S.A., OWNER OF THE M.S. "NICOLAOS S. EMBIRICOS", IN RESPONSE TO THE BRIEF OF APPELLANTS BINGHAM & COMPANY, ET AL.

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BRIEF OF COMPANIA NAVIERA EPSILON, S.A., OWNERS OF THE M.S. "NICOLAOS S. EMBIRICOS", IN ANSWER TO THE BRIEF OF APPELLANTS BINGHAM & COMPANY, ET AL.

Preliminary Statement

On this appeal, Compania Naviera Epsilon, S.A., Owners of the M.S. "NICOLAOS S. EMBIRICOS" ("Owners"),

seek affirmance of the decision of the United States District Court for the Southern District of New York (Honorable Marvin E. Frankel, D.J.), exonerating Owners from liability for cargo loss and damage resulting from the stranding of the vessel off the Maldive Islands in the Indian Ocean on May 15, 1969.

Owners seek a reversal of that part of the decision below which allowed Thos. & Jno. Brocklebank, Ltd., Time Charterers of the vessel ("Charterers"), a recovery from Owners of their legal expenses.

This Brief is addressed only to the issues raised by the appeal of the Cargo Claimants from the decision denying them a recovery; Owners have filed a separate Brief on the issue of the allowance of legal expenses.

Statement of Issues Presented for Review

The District Court found that the "NICOLAOS S. EMBIRICOS" was not unseaworthy, or, that if unseaworthiness of any sort existed, it did not cause or contribute to the stranding which gave rise to the cargo losses. It further found that the stranding was caused by navigational errors of the Master of the vessel. The Court therefore exonerated the Owners and Charterers of the "NICOLAOS S. EMBIRICOS" in accordance with the provisions of the Carriage of Goods by Sea Act, 46 U.S. Code §§ 1300-1315, and allowed Charterers a recovery from Owners of legal fees and expenses totalling $136,374.74.

The only issues to be decided on this appeal, insofar as Owners are concerned, are (1) whether or not the findings of the District Court on the cause of the stranding were erroneous, and (2) whether or not the District Court was correct in holding that Charterers were entitled to recover their legal expenses from Owners.

Statement of the Case

Following the stranding of the "NICOLAOS S. EMBIRICOS" on May 15, 1969, various Cargo Claimants commenced actions against both Owners and Charterers in the United States District Court for the Southern District of New York. On December 1, 1969, Owners filed a petition for exoneration from, or limitation of, any liability arising out of the stranding. The previous actions were thereupon stayed, but all actions were subsequently consolidated for trial on the sole issue of liability for the cargo claims. Following a three day trial in May 1973 and the submission of post-trial briefs and reply briefs, the District Court filed its opinion on November 16, 1973, exonerating both Owners and Charterers from liability in respect of the cargo claims. The Court held that the Owners had "established that the proximate cause of the loss was an excepted peril" and that Cargo Claimants had "failed to satisfy their burden of establishing either unseaworthiness, or, if there was unseaworthiness, a causal connection between the unseaworthiness and the stranding" (107a). Cargo Claimants have appealed from that decision.

Statement of Facts

Cargo's so-called "Statement of the Case" and "Statement of Facts" should more appropriately be labelled "Argument". They seriously misrepresent the testimony presented in the District Court which formed the basis for the Court's decision.

In late March and early April of 1969, the "NICOLAOS S. EMBIRICOS", operating under the time charter between Owners and Charterers, crossed the Indian Ocean from Lorenco Marques, Africa, to Indian and East Pakistani (now Bengali) ports, via Colombo, Ceylon (now Sri

Lanka) for bunkers, proceeding through the One and a Half Degree Channel of the Maldive Islands, between Suvadiva Atoll to the South and Haddumati Atoll to the North.

The One and a Half Degree Channel is approximately 54 miles wide and is described in the British "Pilot" (Exh. 15) as deep and free from dangers. Captain Koutsoukos selected his course from a book entitled "Ocean Passages of the World" (Exh. 37), and, on the eastbound transit, the vessel was not noticeably affected by a current (146a). The vessel's radar was operated during the transit through the One and a Half Degree Channel; it functioned properly, but no returns were obtained (148a). The eastbound voyage was uneventful and the vessel called at her loading ports. At Chittagong the vessel's radar temporarily went out of order after the vessel arrived, but the defect was repaired at Chittagong before departure (131a, Exh. 34).

Based on his experience on the eastbound voyage, Captain Koutsoukos elected to return through the One and a Half Degree Channel. After having bunkered, the Nicolaos S. Embiricos sailed from Colombo at approximately 0800 hours on May 13, 1969. The Captain set a course of 228° T (true) and projected that course on his chart. At noon on the same day, the 13th, the course was changed to 230° T, but the chart projection of 228° T was not changed. Over a 24 hour period the two degree difference in course became material. When a position was obtained one day later—at noon on the 14th—it was seen to be somewhat north of the unchanged 228° course line (Exh. 5). Captain Koutsoukos therefore determined that his vessel had been set slightly to the north. If, however, the course line projected on the chart had been changed at noon on the 13th from 228° T to 230° T it would have shown, in relation to the position obtained at noon on the 14th, that the vessel had actually been set to the east or southeast. The existence of such a set, which accorded with the documentary

current information on board the vessel, ought to have been taken into consideration when the vessel's course was again altered at noon on the 14th, but it was not.

At noon on the 14th the course was altered to 233° T, with the intention of passing through the One and a Half Degree Channel some 16 miles to the north of the northernmost part of Suvadiva Atoll. In fact, given the mistaken apprehension of a northward set, the Captain thought his vessel would pass through the Channel with an even greater clearance. He testified:

> Q. No. 435: Captain, you believed did you not that when you reached position 4 the position would be 16 miles or thereabouts to the North of Suvadiva Atoll? A. I believed not only to be 16 miles North of Suvadiva Atoll but more than 20. I believed in my opinion because of the weather conditions. I thought that the Ship would be drifting Northwards (153a).

The vessel proceeded on course 233° T throughout the rest of the 14th until 2345 hours (11:45 P.M.). At that point the Master determined that the vessel would be through the One and a Half Degree Channel. He left instructions for the course to be changed to 247° T. At 2345 hours on the 14th, during the watch of the Second Officer, Mr. Marinatos, the course was changed to 247° T, on the basis of a dead reckoning position. There are absolutely no aids to navigation in the area of the One and a Half Degree Channel—no lighthouses, no RDF stations, no buoys. After the course change, Second Officer Marinatos and his relief, Second Officer Alexopoulas, believed the vessel to be to the west of the center of the One and a Half Degree Channel.

At about 0122 hours (1:22 A.M.) on May 15th, the Nicolaos S. Embiricos ran hard aground some four miles to the southward of the northernmost tip of Suvadiva Atoll.

Subsequent to the stranding, Cargo sent a surveyor from London, Captain Laister, to board the "NICOLAOS S. EMBIRICOS" at Suvadiva Atoll, and he stayed there nearly a month. Despite repeated requests, and an offer by Owners' counsel to go anywhere in the world to attend Captain Laister's deposition, he was not produced by Cargo. Captain Laister's report was admitted by stipulation (Exh. I, reprinted in part 319a, *et seq.*). He found no deficiencies in the vessel's navigational equipment, nor did he allege that any of her officers were incompetent (319a).

ARGUMENT

Introduction: The burden of proof under the Carriage of Goods by Sea Act (COGSA).

In the District Court, Cargo made four specific allegations of unseaworthiness, all of which were rejected by the Court. On appeal, one (radar) has been dropped, the other three have been expanded to five Points of Cargo's Brief, and another not raised in the District Court has been added (Point VI of Cargo's Brief).

The points of argument raised by Cargo are entirely issues of fact which do not become issues of law by simply tacking on the words "as a matter of law". The District Court correctly conceived and correctly applied the law, and Cargo's contentions form no basis for reversal. *In re Marine Sulphur Queen,* 460 F.2d 89 (2d Cir. 1972); *Leather's Best, Inc.* v. *The Mormaclynx,* 451 F.2d 800, 813 (2d Cir. 1971); *Cleary* v. *United States Lines Co.,* 411 F.2d 1009, 1010 (2d Cir. 1969); *Mamiye Bros.* v. *Barber Steamship Lines, Inc.,* 360 F.2d 774, 776 (2d Cir. 1966) *cert. denied* 385 U.S. 835 (1966).

It is not disputed by any party to this litigation that the applicable law is the United States Carriage of Goods

by Sea Act, 46 U.S. Code §§ 1300-1315 (hereinafter sometimes referred to as "COGSA"), § 1304 of which provides, in part, as follows:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

Unlike its predecessor, the Harter Act, 46 U.S. Code §§ 190-196, this exception of COGSA is not conditioned on a showing of due diligence to make the vessel seaworthy.* If the exception is shown to be the cause of the loss, the carrier is exonerated. To recover, the burden is upon Cargo to establish unseaworthiness as a *cause* of the loss. This Cargo failed to do and the District Court was not in error in refusing to accept Cargo's invitation to substitute speculation for cause.

In *Director General of India Supply Mission* v. *The Maru*, 459 F.2d 1370 (2d Cir. 1972), this Court stated (at p. 1372):

> The shipper has urged that the ship was unseaworthy because its charts of the Grand Bahama Island area were published in December 1939 and

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* Throughout Cargo's Brief cases decided under the Harter Act and under COGSA are cited without indication of which Act applied. On many specific issues precedents under either Act may be cited interchangeably. *The Bill*, 47 F.Supp. 969 (D.C. Md. 1942), aff'd 145 F.2d 470 (4th Cir. 1944); *The Zarembo*, 44 F.Supp. 915 (D.C.N.Y. 1942), aff'd 136 F.2d 320 (2d Cir. 1943) *cert.* denied 320 U.S. 804 (1944). However, on the vital issue of causation there is a very distinct difference. Under the Harter Act, exoneration from liability for the consequences of an error in navigation or management is conditioned on a showing of due diligence to render the vessel seaworthy. *The Isis*, 290 U.S. 333 (1933). COGSA contains no such requirement. See Gilmore & Black, *The Law of Admiralty*, 133-139.

brought up to date only to November 25, 1944. It is not disputed that the chart was almost 20 years old and inaccurate. For this reason the vessel was unseaworthy as found by the lower court. Farr v. Hain S.S. Co., 121 F.2d 940, 945 (2d Cir. 1941); The Maria, 91 F.2d 819, 824 (4th Cir. 1937). *This however does not end inquiry. Where the carrier has brought itself, as in this case, within the excepted peril of negligent navigation, the burden then shifts to the cargo owner to establish that the unseaworthiness caused the damages sought.* "Therefore once the carrier has brought forth evidence establishing the defense of error in management the burden is on the shipper to show that the ship was unseaworthy and that the damage was caused by such unseaworthiness." Firestone Synthetic Fibers Co. v. M/S Black Heron, 324 F.2d 835, 837 (2d Cir. 1963).*

Compania General De Tabacos De Filipinas v. *United States*, 49 F.2d 700 (2d Cir. 1931), cited at p. 11 of Cargo's Brief, a Harter Act case, is inapposite, as is Cargo's citation, at p. 12 of its Brief, of *Union Carbide and Carbon Corp.* v. *The Walter Raleigh*, 109 F.Supp. 781 (S.D.N.Y. 1951), aff'd 200 F.2d 908 (2d Cir. 1953). In the latter case the Court held a shipowner liable because it found that an element of unseaworthiness was "an effective and proximate cause of the damage" (109 F.Supp. 793). In the present case, on the other hand, the District Court specifically found to the contrary. It held that there was no element of unseaworthiness causally connected with the stranding (Opinion pp. 26, 107a).

During the course of the litigation, the cause of the stranding was variously referred to by Owners and Charterers as an act of negligence in the navigation of the vessel; by Cargo's Counsel as a "blooper" (252a);

* Emphasis throughout this Brief is supplied, unless otherwise indicated.

by Owners' expert, Captain Maiden, simply as an "error" (252a); by Cargo's expert, Captain Laister, as an act of "imprudent" navigation (Exh. I), and by the District Court as an act of "negligent navigation" which was "the immediate and sufficient cause of the strand" (89a). It can scarcely be doubted, therefore, that Owners and Charterers have sustained the burden placed upon them by COGSA and demonstrated that the loss fell within the "error in navigation or management exception" of Section 4(2)(a) of COGSA, 46 U.S. Code § 1304(2)(a).

Cargo nevertheless labors to attribute the loss to unseaworthiness, in the main by contending that the manning of the "NICOLAOS S. EMBIRICOS" was deficient, or that her officers were incompetent (Points I-IV of Cargo's Brief). The contention is invalid. At p. 23 of its Brief, Cargo states:

> Nowhere in the District Court's opinion is there any reference to or hint of the standards which it used in concluding that the master was, in fact, competent. The Court does not refer to cases, statutes or testimony in support of its finding. We submit that there is an apparent lack of understanding on the part of the District Court of the qualifications required by law of the master, and, for that matter, the deck officers of a vessel.

In the pre-trial, trial, post-trial and reply briefs, all relevant citations on manning requirements were brought to the Court's attention.* In fact, in discussing competency

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* Cargo chose not to submit a post-trial reply brief although entitled to do so. If Cargo felt the Court required additional citations or arguments there was ample opportunity to provide them.

(98a) the District Court cited *Director General of India Supply Mission* v. *The Janet Quinn*, 335 F.Supp. 1329 (S.D.N.Y. 1971), wherein the Court stated (pp. 1338-1339):

> Captain Hamby was not incompetent in that he did not understand international whistle signals and his confusion was an error in navigation. A ship owner is not liable when he selects a Master who has the usual certificates and had good recommendations. Phillips v. United States, 286 F. 631 (D.C.Md. 1923). Captain Hamby was a qualified and experienced Master. The law is clear, the owner who has appointed a competent Master is entitled to rely on the Master's judgment in navigation and should not hamper further exercise of his judgment with instructions and orders. President of India by and through Director of India Supply Mission v. West Coast S.S. Co., 213 F.Supp. 352 (D.C. Or. 1962), affirmed 327 F.2d 638, cert. denied 377 U.S. 924, 84 S.Ct. 1222, 12 L.Ed.2d 216 (1964). A ship owner is not liable for damage to cargo caused by error or neglect in navigation. American Metal Company v. M/V Belleville, 284 F.Supp. 1002 (S.D.N.Y. 1968).

The District Court further cited *American Tobacco Company* v. *Goulandris*, 173 F.Supp. 140 (S.D.N.Y. 1959), aff'd, 281 F.2d 179 (2d Cir. 1960), modified *sub. nom. Lekas & Drivas, Inc.* v. *Goulandris*, 306 F.2d 426 (2d Cir. 1962), wherein, at pp. 173-174, the District Court stated:

> All the officers were properly licensed and experienced seamen; this of itself establishes prima facie due diligence cf. The Buckleigh, 2 Cir., 31 F.2d 241, 242. But, independently of the licenses, it appears that the Master Polemis, in command of the vessel when it was loaded, had had considerable tobacco cargo experience, and that the other officers

were experienced in the handling of perishable cargoes and were not ignorant of the characteristics of a tobacco cargo.

In short, the District Court was perfectly aware of the standards applicable to the issue of the vessel's manning requirements and qualifications. In its decision, the Court found that the Owners of the "NICOLAOS S. EMBIRICOS" had complied with those standards. The arguments raised in Points I through IV of Cargo's Brief on the subject of manning are treated under Points I and II of this Brief.

Cargo's argument under Point V of its Brief, relating to navigational publications, is patently a makeweight and is without substance. It is treated herein under Point III.

POINT I

The "NICOLAOS S. EMBIRICOS" was properly manned in accordance with Greek law.

Cargo's argument with respect to the manning of the "NICOLAOS S. EMBIRICOS", centering upon the retention of Acting Second Officer Alexopoulos as Second Officer, is grossly misleading.

In the Greek Merchant Marine, there are only three deck officer ratings: master, chief officer and second officer. The "NICOLAOS S. EMBIRICOS", as required on vessels of her size, carried, in addition to the master, a chief officer and two second officers, one of whom, Mr. Marinatos, was fully licensed. The other, Mr. Alexopoulos, while not licensed, was serving as a second officer pursuant to permission granted under the Greek law governing the vessel.

The applicable standards of manning are those determined in accordance with Greek law. That those standards may differ from the standards observed aboard United

States vessels,* or vessels of any other flag—they may be stricter with respect to some areas of nautical competence, and less strict with respect to others—is not something about which Cargo may complain. Having chosen to ship on a foreign vessel, Cargo must accept the standards established by the law of the vessel's flag. See *Wilbur-Ellis Company* v. *The Captayannis "S"*, 306 F.Supp. 866 (D.C. Ore. 1969), aff'd 451 F.2d 973 (9th Cir. 1971), *cert. denied* 92 S.Ct. 962 (1972).

The "NICOLAOS S. EMBIRICOS" was not subject to the general laws of Greece with respect to the number of licensed officers required and/or the duration of the retention of substitutes for licensed officers permitted under the general laws. She was built and registered in Greece under a *specific law,* known as an Instrument of Approval, promulgated by the Greek Government pursuant to express constitutional authority (284a, Exh. 9, 303a-318a). Mr. George L. Daniolos, a member of the Athens Bar since 1926, long experienced in the admiralty field (282a-283a), testified that "the provisions of the Law 2651 [the Greek General Statute] are not to apply, so far as time limits are concerned, are not to apply in the case where the Instrument of Approval does not provide any time limits" (285a). There were no time limits for the retention of substitutes for licensed officers employed on the "NICOLAOS S. EMBIRICOS" in the Instrument of Approval under which she was registered (Exh. 9, Section 8, 307a-308a).

Cargo states, at p. 18 of its Brief, that the "District Court did not disagree" with the interpretation of Mr. Nicolaidis, Cargo's expert on Greek law, as to the interrelation between the Instrument of Approval of the "NICOLAOS S. EMBIRICOS" and the general Greek law, which places time limitations on the employment of technically

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* It should be noted that United States law also provides for temporary licensing of officers. Such Third Mate licenses may be valid for a period of five years. 46 C.F.R. Subpart 11.

unlicensed crewmen. Such a convoluted statement makes it difficult to tell to what interpretation Cargo is referring. The District Court very definitely *did* disagree with Mr. Nicolaidis. It held that Mr. Nicolaidis "was unable to cite support [for his opinion] other than a simple reading of the statute alone" (Opinion, p. 22, 103a).

Cargo states that Mr. Nicolaidis "stated the obvious" in his testimony on Greek manning requirements (Cargo Brief, p. 18). His testimony, however, was far from obvious (274a, 275a). When questioned on his experience with ship manning operations, he testified:

> Q. So you really don't know whether there are any official records for requests for— A. No, I don't know, Mr. Baillie. I haven't done this work before, so whatever I say might be wrong (279a, 280a).

When questioned as to time limitations in the Instrument of Approval, he testified as follows:

> Q. Tell me where in the instrument of approval you (209) find any provision for the replacement of men who have been properly signed on, even though they might not have the respective licenses? Where is that provision in the instrument of approval? A. Of the Embiricos. Will you excuse me while I look?
>
> Q. Sure, go ahead. A. Under article 8 I cannot see any provision.
>
> Q. No, I don't think you will find one. I know you won't. You can't find it? A. I can't see any provision. (274a)

Questioned further by the Court, Mr. Nicolaidis testified:

> Q. So if I look at that instrument of approval and it looks to me as though they have a greater freedom to use unlicensed personnel, then that would

> displace 2651 to that extent? Yes?(211) A. Sorry, I didn't follow your thought.
>
> Q. If that instrument of approval, if I read it—
>
> A. Yes.
>
> Q. —is found to allow the Embiricos to keep people for two years without a license, then they can keep them for two years no matter what 2651 says? A. They can. They can. Because, as an example, your Honor, I can tell you other instruments of approval which were passed by the Greek Government ten years later where they specify the time which the owners—the time limits within which the ship owners are obliged to substitute unlicensed people. And it gives them longer than the basic law 2651. (275a)

The District Court agreed with the opinion and reasoning of Mr. Daniolos and Admiral Hanides, a former director of the Ministry of Merchant Marine, and "with the shipowner's view that the specific terms of the Instrument of Approval are controlling." (Opinion, pp. 23, 104a).

Admiral Hanides, at one time Commandant of the Greek Port Officers Corps (the counterpart of the United States Coast Guard), and the person "responsible for all these things and for all these laws which were issued by the Greek Government" (187a), testified:

> Q. Admiral, is it also not correct that pursuant to Article 13 or any decrees propagated in accordance with or based upon Article 13 that if an individual who is not properly licensed has signed aboard a Greek flag vessel he must be substituted after the elapse of 12 months irrespective of the port of call? A. In the instrument of approval Epsilon Exhibit I there is no such provision. (187a)

This is not to say that the manning of a Greek flag vessel was or is without Government supervision and

control. The officers of the Port Officers' Corps have the right to check the seaworthiness and safety of the vessel (287a-288a). It *is* to say that there was *no statutory violation* in retaining Mr. Alexopoulos as an acting Second Officer.

Since the Instrument of Approval of the NICOLAOS S. EMBIRICOS is a special law and does not set any time limits, the provisions of the general Greek law, insofar as time limits are concerned, are preempted by the silence of the Instrument of Approval. This silence should not be interpreted as allowing the general provisions to prevail, since other Instruments of Approval, subsequently issued, did set time limits (275a). To hold, as Cargo contends, that the absence of time limitations in the Instrument of Approval imports the limitations of the general Greek law or confers no advantage whatever, is at odds with basic principles of construction. It is also at odds with the testimony of Mr. Daniolos, who stated that the purpose of such instruments was to grant something "beneficial" (286a), and with the testimony of Cargo's own expert, Mr. Nicolaidis, who stated that the purpose was to grant "advantages" (275a). Cargo's reading of the Instrument of Approval renders the language surplusage and the "benefit" or "advantage" nugatory. The District Court was clearly correct in holding that the Instrument of Approval was intended to "expand the rights which a shipowner would otherwise have under Greek law" and that it "negated the applicable time limits" of the general Greek law (Opinion, pp. 23, 104a).

Under Greek law, therefore, the Owners of the NICOLAOS S. EMBIRICOS were not required to comply with the time limitations of General Law 2651, since the NICOLAOS S. EMBIRICOS enjoyed the specific benefits and privileges of an Instrument of Approval. However, even under the limitations of General Law 2651 there is a provision for retaining unlicensed officers on board a vessel if licensed replace-

ments are unavailable. Admiral Hanides, whose duty at the time was the "enforcement of maritime law and shipping policy", testified as to the general availability of Greek second officers. He testified, in May of 1970:

> A. I would say that since 1966-67 there was not in sufficient numbers available Second Mates. Though every year there are around 1500 new Second Mates they are not available to complete all the posts of Second Mates on Greek vessels and vessels under foreign flags of Greek interests. (184a)*

Mr. Alexopoulos' continued service aboard the "Nicolaos S. Embiricos" received the approval of the Greek authorities each time the Ship's Articles were reviewed (Exh. 10). Specifically, in October 1968, only seven months before the stranding, the Articles were reviewed and approved by Captain George Kypriotes, the Consular Port Captain of the Port of Rotterdam (191a). Captain Kypriotes testified that licensed Second Mates were then unavailable (193a). The vessel did not put into a Greek port after Mr. Alexopoulos was signed on.**

Confronted with such testimony, Cargo produced at trial Exhibit Q, the so-called "Barkis letter", in an attempt to show that licensed Second Officers were available. Given the "brouhaha" attending the introduction of Exhibit Q, the District Court could hardly have overlooked it as Cargo suggests at p. 18 of its Brief. Given its nature—hearsay based upon hearsay—the Court accorded it the weight it was due, *i.e.*, none. Exhibit Q states only that

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* If an input of 1500 mates per year did not satisfy the demand, the availability of the relatively few mates as a result of the incidents described at p. 17 of Cargo's Post-Trial Brief cannot be regarded as significant.

** It is not true, as Cargo states at p. 14 of its Brief, that Mr. Alexopoulos was not paid a mate's wages. He was paid *more* than a mate's wages, though slightly less than Mr. Marinatos (264a).

unemployed second officers had registered with the Employment Office and that Owners had made no inquiry during the period in question (326a). However, since Mr. Nicolaidis, Cargo's expert, did not even initiate the request for the affidavit (it was requested by his assistant) and since Mr. Barkis did not testify, the extent of such availability, the character or qualifications of the registrants, and the conditions attached to their employment could not be examined. Mr. Nicolaidis admitted he did not know whether the Ministry kept records of verbal requests. The testimony of Mr. Andronikis indicates that a good deal of the communication involved in manning vessels is carried on verbally or by telephone.* In short, there is no credible evidence whatever that licensed second officers would have been available in the Spring of 1969, even if the Owners of the NICOLAOS S. EMBIRICOS had been obligated under general Greek law to go searching for them to replace Mr. Alexopoulos. Cargo's argument under Points I and II of its Brief is, therefore, factually in error, and to the extent it is not in error, it is wholly irrelevant.

In the absence of a statutory violation, which was not shown, the drastic presumption of *The Denali*, 105 F.2d 413 (9th Cir. 1939), is inapplicable.

In view of later decisions, the continued vitality of *The Denali* (quoted at length at p. 19 of Cargo's Brief) may well be doubted. That case applied the *Pennsylvania* Rule burden of proof to a violation of statutory manning requirements. In a subsequent case, *United States* v.

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* At page 14 of Cargo's Brief it is suggested that Mr. Andronikis' testimony should be treated circumspectly because of his reference to the Greek Easter holidays. However, Mr. Andronikis was referring to the "oncoming" Easter holidays and the "signing-on" of Mr. Alexopoulos at Ravenna in April 1968, *i.e.*, at the time of the Greek Easter (263a). Cargo's citation of the testimony is incomplete and misleading.

Wessel Duval & Co., 123 F.Supp. 318 (S.D.N.Y. 1954), the District Court stated (at pp. 335-337):

> The Edward Rutledge was guilty of statutory fault in starting and continuing the voyage without having obtained a full complement of officers. The burden is on the vessel to establish "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" one of the causes of the stranding. The Pennsylvania, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148, 151. While the rule so enunciated has been stated as one which in effect penalizes the violator by reason of the extreme difficulty, if not impossibility, of showing that the violation could not have contributed to the accident, (The Princess Sophia, 9 Cir., 61 F.2d 339), the "history of its application shows that it has done no more than shift the burden of proof with regard to causality." The Aakre, 2 Cir., 122 F.2d 469, 474, certiorari denied, Waterman v. The Aakre, 314 U.S. 690, 62 S.Ct. 360, 86 L.Ed. 552. In the presence of statutory fault a presumption arises that such fault contributed to the disaster—be it collision or stranding—and the burden is then placed on the vessel to establish that there was no causal connection between the two, that is, that the violation was not an "operating factor." Since the rule of The Pennsylvania, supra, has been interpreted to be one of procedure, the court in applying it is "limited to the reasonable probabilities." The Mabel, 2 Cir., 35 F.2d 731, 732.
>
> * * *
>
> I find that the violation by Wessel Duval of the statutory requirement that there be three licensed mates aboard in no way contributed to the stranding of the Edward Rutledge on the morning of April 15. It is apparent that observance of the statute by the

> presence of a third mate aboard would not have averted the disaster; in such case "the nonobservance of such rule becomes immaterial." The Umbria, 166 U.S. 404, 17 S.Ct. 610, 616, 41 L.Ed. 1053, 1061.

The District Court in this case similarly found—and there was adequate evidence to support its finding—that the presence aboard the "NICOLAOS S. EMBIRICOS" of a technically unlicensed Second Officer in no way contributed to the stranding (Opinion, p. 24, 105a). See also *Petition of Diesel Tanker A.C. Dodge, Inc.*, 133 F.Supp. 510 (E.D. N.Y. 1955), aff'd 234 Fed. 374 (2d Cir. 1956), *cert. denied* 352 U.S. 928 and 929 (1956).

More recently Judge Mulligan stated in *Director General of India Supply Mission* v. *The Maru, supra* (at 459 F.2d 1375, footnote 6):

> Although we find that *The Pennsylvania* rule by its own terms is not applicable in this case, it is in my view (as to which Judge Mansfield takes no position) an anomaly which is no longer supportable. *Where COGSA rules of burden of proof would be otherwise applicable, there is no reason to apply The Pennsylvania. The burden of proof rules in COGSA represent a studied statutory scheme in a difficult area.* (See Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426 (2d Cir. 1962); Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co., 274 F.Supp. 884 (D. M.D. 1967); G. Gilmore & C. Black, The Law of Admiralty § 3-43, at 162-63 (1957); Comment, Cargo Damage at Sea: The Ship's Liability, 27 Texas L. Rev. 525 (1949). Marine safety statutes should be enforced irrespective of loss and whatever sanctions they provide should be exacted where violated. However, to utilize their breach for the imposition of a drastic burden of proof rule, is in my view illogical and inequitable. The unequal bargaining power of

> the ship owner which created the predictable inequities of the contract of adhesion, have been remedied in large measure by COGSA. Hence where it is applicable, the *ad hoc* judicial spleen of *The Pennsylvania* (which predated even the Harter Act) provides in my view a punitive response no longer necessary.

In any event, the *Pennsylvania* Rule as applied to vessel manning requirements via *The Denali* is not applicable here.

This Court stated in *Director General of India Supply Mission, supra* (at 459 F.2d 1375), referring to the *Pennsylvania* Rule, "the rule, as articulated by the Supreme Court, was limited to the violation of a statute intended to prevent the catastrophe which actually transpired".

The statute involved in *The Denali, supra,* provided that a vessel must sail with three watch officers, who were each to stand watches of four hours, twice daily. In fact, *The Denali* sailed regularly with only *two* officers who stood watches of *six* hours, *i.e.,* instead of standing a total of eight hours on watch each day they stood twelve. The statute was designed to prevent fatigue in watch standers and its violation was directly related to the navigational mistakes causing the stranding.

In the instant case, on the other hand, the statute alleged to have been violated limiting the period of service by an unlicensed second officer had no such purpose. Manifestly, a man qualified to fill the position for 365 days does not become unqualified on the 366th day. The statute was not enacted as a safety requirement, nor was it designed to benefit cargo claimants. Its purpose was concerned only with Greek employment and union policy.

Cargo's emphasis on two minor errors in the District Court's 30-page opinion is inappropriate. Both errors, one drawn to the Court's attention by the Owners and one

by Cargo, were considered by the Court and corrected. They were of little consequence, and neither bore on the Court's ultimate findings or conclusions.

In *The Aakre,* 122 F.2d 469 (2d Cir. 1941), *cert. denied* 314 U.S. 690 (1941) the Court stated, at 474-475:

> The questions involved in this proceeding were questions of fact which the court below resolved in an opinion which demonstrates the care and consideration which he gave to the matter. D.C.S. D.N.Y., 31 F.Supp. 8-23. *In view of this, criticisms made of it that he was confused as to the navigator of the ship, because he did not always distinguish between the master and the second mate, seem rather captious. His material findings are clear and definite.* We have recently emphasized that admiralty findings should be accepted on appeal unless clearly erroneous. United States Gypsum Co. v. Conners Marine Co., 2 Cir., 119 F.2d 689; Johnson v. Andrus, 2 Cir., 119 F.2d 287; McAllister Bros. v. Pennsylvania R. Co., 2 Cir., 118 F.2d 45. Here they seem quite the most natural and rational under the circumstances; indeed, cargo's real complaint is with the policy of Canada and ourselves as to the merchant marine, which accords the water carrier full protection against the negligent navigation of its own servants. Robinson on Admiralty, 1939, 495-503.

A full reading of the opinion below discloses that the Court carefully considered, *and rejected,* the four allegations of unseaworthiness put forward by Cargo. At p. 26 of its Brief, Cargo "wonders" if the result would have been different if lives had been lost. Such speculation, following Cargo's "parade of horrors" argument, is both inappropriate and inaccurate. If new technology and environmental concern make desirable any change in the policy embodied in the Carriage of Goods by Sea Act—the

United States statutory implementation of the Brussels Bill of Lading Convention of 1924—the change must be wrought by international convention and domestic legislation.

POINT II

The "NICOLAOS S. EMBIRICOS" was properly manned by competent personnel.

At the commencement of the voyage the officer complement of the "NICOLAOS S. EMBIRICOS" consisted of the Master, Captain Efstratios Koutsoukos, the Chief Officer, Mr. Ioannis Boulmetis, Second Officer George Marinatos, and an additional Second Officer, Mr. Paraskevas Alexopoulos. All were experienced and capable mariners. The three deck officers, apart from the Master, stood watches of four hours each. The Master, as is usually the case, was primarily concerned with, and responsible for, the vessel's navigation. See *United Geographical Company* v. *Vela*, 231 F.2d 816 (5th Cir. 1956).

Captain Koutsoukos had held a Greek Master's license since 1931 (171a), and had been the Master of the "NICOLAOS S. EMBIRICOS" since the time of her construction in 1958 (130a). In 1958 he had taken a radar course in Liverpool, England (129a). During the entire period he commanded the "NICOLAOS S. EMBIRICOS" the vessel had not been involved in any serious incident. The two strandings referred to at page 25 of Cargo's Brief were of minor consequence (135a-136a). The first was caused by drift ice in the vicinity of Helsinbog. The other occurred in fog, while the vessel was proceeding in a channel in the Philippines. The vessel worked herself free by the use of her engines in three hours (Koutsoukos Dep., p. 63). As the Court stated in *The Aakre*, 122 F.2d 469 (2d Cir. 1941), at p. 474:

> It affirmatively appears that on at least one of these occasions the Aakre was navigating in narrow

> Norwegian coastal waters, through strong currents, in a snow storm and a hurricane. Such circumstances as those would certainly support no inference of unseaworthiness.

Between the stranding and the time his testimony was taken at the United States Embassy in Athens, Captain Koutsoukos suffered a heart attack. At the time his testimony was taken, he had not been to sea in nearly a year. Yet Cargo persisted in pressing questions calling for mathematical responses and vector analysis rather than practical navigation. Aboard the "NICOLAOS S. EMBIRICOS", however, shortly after the stranding, Cargo's representative, Captain Laister, reviewed the navigation with Captain Koutsoukos (and the Chief Mate of the Tug "ORINOCO"). Captain Laister reported that Captain Koutsoukos' chronometer rate book was "well kept and up to date"; that he always had all necessary calculations "checked independently by the 2nd Mate"; that he "habitually took a set of 4 sights on each occasion when making observations", a manifestly cautious practice (Exh. I). A check of Captain Koutsoukos' calculations by Captain Laister and the Chief Mate of the "ORINOCO" revealed that his calculations were correct (Exh. I, 324a). These practices hardly bespeak incompetence. Indeed, the logical inference is that Captain Koutsoukos was a conscientious, and, except for this one occasion, cautious mariner.

While Captain Koutsoukos' error in failing to change his 228° T. course projection now appears, with the benefit of hindsight, to be "obvious", there was nothing obvious about it at the time. The District Court noted that it was not picked up by Second Officer Marinatos, as to whose competency no question is raised. Although the record does not indicate on whose watch the change of course was made at noon on the 13th, it would normally have been made on Mr. Marinatos' watch. The only other change of course, at 2345 hours on the 14th, was also made on his

watch. Chief Officer Boulmetis, whose competency is also unchallenged, stood three watches between the time of the course projection and the stranding. He, too, did not discern the error. In fact, Captain Laister, Cargo's expert, who reviewed the navigation of the "NICOLAOS S. EMBIRICOS" on "numerous occasions", did not note the error (Exh. I—319a *et seq*).

Mr. Alexopoulos, the additional Second Officer, had been going to sea since 1947 (209a) and had served in various capacities up to and including a short period of service as an acting Chief Officer (210a). He had served with the Embiricos "Group" for many years (210a). He was capable of performing the tasks assigned to the positions in which he served (210a, 211a). He signed on the "NICOLAOS S. EMBIRICOS" at Ravenna in April, 1968 (209a). Subsequent to his retention in March for service commencing in April, the Owners of the "NICOLAOS S. EMBIRICOS", with difficulty, retained Second Officer Marinatos, who also asked for and obtained a salary higher than that provided for in the union scale (263a, 264a).

Cargo's statement, at p. 22 of its Brief, to the effect that Mr. Alexopoulos was not permitted to turn the radar on is misleading. Captain Koutsoukos regularly insisted that all his officers summon him whenever they felt use of the radar was necessary. This not unusual practice was established to reduce maintenance problems. Mr. Alexopoulos testified that the Master never refused a request to turn it on (222a).

As far back as *The Fri*, 154 Fed. 333 (2d Cir. 1907), *cert. denied* 210 U.S. 431 (1908), this Court, in exonerating a vessel owner from liability to cargo, stated with respect to a similar omnibus charge of incompetency as is made herein by Cargo (at pp. 335-336):

> The ground upon which the court below condemned the vessel was that the disaster was caused by the negligence of the master, that the stipulation

in the charter party was qualified by the provision in the bill of lading in reference to the Harter act, and that it had not been so satisfactorily proved by the owners of the vessel that they had used due diligence in the selection of the master as to enable them to obtain the benefits of the Harter act. In his opinion the District Judge said, speaking of the master:

> "The variety of his long experience at sea indicates sufficient skill to conduct the steamer during a four days' voyage without collision with the reef. He was careless in gathering facts, or in failing to use facts that were plainly laid before him in a printed book. Capacity to perform a duty includes not only technical skill, but also disposition to use the same."

It appeared by the proofs, and was undisputed, that the master for over 15 years had navigated ocean vessels as master in many seas. Before he was appointed to the command of the Fri by her owners he had been in command of another steamship of theirs for over a year, and he had made several voyages in command of The Fri before the voyage upon which the disaster took place. They had had an ample opportunity to estimate his capacity. It would seem to be holding them to an extreme and impracticable rule of diligence to require them to give better proof of his general competency than was actually shown. The testimony in respect to his navigation upon the voyage in question, to which it is not necessary to advert, was sufficient to show his competency generally; and it does show that the disaster happened not through his incompetency or inefficiency, but by putting his own judgment, based upon his

general experience and what he thought he had ascertained respecting the force and direction of the currents during the previous two days, against the instructions of the books and charts with which he had been provided.

In *The Buckleigh*, 31 F.2d 241 (2d Cir. 1929), *cert. denied* 280 U.S. 564 (1929), Judge Augustus N. Hand, writing for the Court, stated (at p. 243):

> It is to be observed that each of these officers was a man of long experience, who, moreover, had been 5 months with the claimant [shipowner] prior to the time of the stranding. It would seem unreasonable to require further evidence of fitness. If such men as these had anything against them, because of some prior display of bad character or incapacity, the libelant ought to have offered proof of this to meet the prima facie showing of training and capacity that such long service and unrevoked masters' certificates made. Enough evidence was offered to place upon the libelants the duty of going forward with proof, if they wished to avoid the exemptions of the Harter Act (46 USCA § 190 et seq.). This conclusion is in accord with our opinion in The Fri, 154 F. 333.

In *United States* v. *Los Angeles Soap Co.*, 83 F.2d 875 (9th Cir. 1936), the Court stated (at p. 879):

> Therefore, considering the present record as a whole on the subject of Appel's competency, including the evidence of his long employment record both before and after his service on the West Cajoot, we find no reason for disturbing the finding of the court below that the West Cajoot was in a seaworthy condition when she left Manila.

In *Petition of Diesel Tanker A. C. Dodge, Inc.*, 133 F. Supp. 510 (E.D.N.Y. 1955), aff'd 234 F.2d 374 (2d Cir. 1956), *cert. denied* 352 U.S. 928, (1956), a vessel owner was granted limitation of liability for losses arising out of a collision. On the issue of undermanning the Court stated (at pp. 520-521):

> It is assumed but not decided, that the Dodge was undermanned for the purpose of a coastwise voyage which had been begun when she left Eagle Point to the knowledge of her owner and operator (Spentonbush).
>
> Much of the discussion in the briefs filed by the claimants has to do with this aspect of the case, and rests upon the proposition that Captain Elliott, who had to act as pilot since his son did not hold a pilot's license for the Delaware River, must have been an overtired and fatigued man. From the nature of the case it will be seen that this is purely argumentative, not evidentiary. Captain Elliott had returned to the Dodge but four days before the voyage in question, having taken his ten days' time ashore under a custom prevailing on the ship, which was with the knowledge and acquiescence of the owner.
>
> • • •
>
> The authorities relied upon by the claimants, namely, The Denali, 9 Cir., 105 F.2d 413; The N. Y. Marine #10, 2 Cir., 109 F.2d 564; Moran Towing & Transp. Co. v. United States, 80 F.Supp. 623; and South Carolina State Highway Dept. v. United States, D.C., 78 F.Supp. 598, all involve fault and mishandling by the undermanned vessel, as the result of which limitation was denied upon the theory that there was a direct or causal relationship between that undermanning and the faulty navigation which caused the misadventure present in each cause.
>
> There has been no such demonstration here.

In affirming the District Court's decision in the *A.C. Dodge* case, *supra*, this Court stated (at 234 F.2d 374):

> We see no reason to reject the judge's finding that, even assuming the Dodge was undermanned, there was "no causal relation between" the "undermanning and her navigation immediately prior to and at the collision." This disposes of the cross-appeal.

Cargo's charges of incompetence against Captain Koutsoukos and Second Officer Alexopoulos are based primarily upon "quizzes" conducted during a supposedly serious extraction of the facts from eyewitnesses to the casualty. Hypothetical problems were posed to each officer after he had answered questions calling for factual answers. Captain Koutsoukos simply did not understand what the examiner was trying to do, and was reluctant to make the assumptions the examiner wanted him to make. His answers, while not mathematically correct, were correct in substance, and they indicated he would have allowed for a current set on the assumed facts (154a-156a). Mr. Alexopoulos was quite aware of the basic mathematics involved in the problem put to him, and his answers would have been correct if he had not inadvertently applied the current factor in the opposite direction to that posed in the question (226a-227a).

Mr. Alexopoulos was also "quizzed" on the International Rules of the Road at Sea (217a), but the questions put to him had to do with the signals to be sounded and the lights to be displayed by towing vessels. He was put in a position fairly analogous to that of a law school graduate asked to answer questions concerning details of procedural law on a bar examination without benefit of a bar review "cram" course. Furthermore, this was not a collision case, and the questions were clearly not relevant to the inquiry. He was testifying through an interpreter and the difficulty

this presented is indicated by the following questions and answers:

> "Q. What is a backing signal? A. What color has it behind.
>
> Q. No, no. What whistle should be sounded on board a ship when its engines are going astern? A. When it is going backwards.
>
> Q. Yes? A. Three short blasts."

His answer was correct. See 33 U.S.C. § 147(a).

Cargo's elicitation from Captain Maiden of what it regards as answers favorable to its contentions as to competence (Cargo's Brief, page 21) should be examined in context. Questions and answers selected from the transcripts of the depositions of Captain Koutsoukos and Mr. Alexopoulos were read to Captain Maiden and questions carefully framed in this manner, "Nevertheless, based upon what I have read, do you have an opinion, etc." Based upon the limited information contained in what was read to him, his answers were of little or no value (255a).

Cargo's inability to seriously challenge the competency of the vessel's crew is manifest from its failure to call as a witness Captain Laister, who was present with Captain Koutsoukos and Second Officer Alexopoulos at Suvadiva Atoll for over two weeks.

In his report, Captain Laister states, "We discussed the navigation of the 'NICOLAOS S. EMBIRICOS' on numerous occasions with Captain Koutsoukos who was most co-operative . . ." (Exh. I, p. 11).*

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* There was a reason for Captain Koutsoukos' open co-operation with a representative of a potentially adverse party. Capt. Koutsoukos testified:

> Q. Did he [Captain Laister] say whether he represented the vessel underwriters or Cargo underwriters? A. At the beginning as far as I remember he said that he was Ship's Underwriters but later on I do not remember whether it was the same day or the second day or the third day he said that he was representing the Cargo. (170a)

It was Captain Laister who, apart from the Salvors, was first on the scene, determined which documents were worthy of preservation, and first interrogated the witnesses. Nowhere in Captain Laister's report does he allege unseaworthiness or incompetency as a cause of the loss, and he was not produced as a witness on deposition, or at the trial, despite repeated requests for his production.

Captain Laister's unexplained failure to testify requires an inference that his testimony, if given, would have been adverse in the extreme to Cargo's interests. In *Hampton Roads Carriers, Inc.* v. *Allied Chemical Corp.*, 329 F.2d 387 (4th Cir. 1964), *cert. denied* 379 U.S. 839 (1964), the Court stated (at p. 392):

> As the representative of Cargo he could have detailed the manner of the inspection. Yet Cargo deliberately omitted to call him. With characteristic candor, its counsel tell us why: because he would say that the sinking was due to faulty loading.
>
> This omission may have been advisable trial strategy—as the least hurtful—but it does not erase the adverse implication. His absence is damaging indeed. It implies that he would have testified to an inspection fulfilling the exactions of due diligence.

See also *O. F. Shearer & Sons* v. *Cincinnati Marine Service*, 279 F.2d 68 (6th Cir. 1960).

Captain Laister's conclusions, stated in full, were as follows:

> It would seem probable that the "NICOLAOS S. EMBIRICOS" ran aground as a result of a strong E'ly current (more precisely E.S.E. 1.8 knots over a 13½ hour period) *and not as a result of defective Navigational Equipment.*
>
> In our opinion:
>
> (1) The angle of approach to the One and Half Degree Channel was imprudent as this effectively manoevered the channel from a safe width of 52

miles to a safe width of 28 miles and exposed the vessel to the full force of any current.

(2) The vessel should not have been navigated through an un-lit channel in the circumstances of darkness and uncertain position and unknown currents and set.

(3) The Radar should have been at least tried to see whether any picture was obtained.

(4) The W.S.W. and S.W. winds recorded in the Log Book could have had some effect on the course of the vessel as the wind was fractionally on the starboard bow. (324a, 325a)

Summarizing, Owners have squarely met their burden of proving that the stranding and consequent cargo loss resulted from errors in navigation or management—a cause for which they are entitled to exoneration from liability under the plain language of COGSA, the governing statute. To recover, Cargo would then have had to meet its burden of proving incompetency or other "unseaworthiness" as a contributing cause. If any evidence of incompetency existed, it would have been in the hands of Cargo's own witness, Captain Laister. Having failed to call him, Cargo had no right to expect the District Court to speculate concerning the alleged incompetency of officers of many years experience, duly qualified to serve in accordance with the law governing the vessel here involved. Indeed, it should be inferred that had Captain Laister testified, he would have conceded that negligent navigation, and not unseaworthiness or incompetency amounting to unseaworthiness, was the only cause of the loss.

POINT III

The "NICOLAOS S. EMBIRICOS" was supplied with all necessary nautical publications for a safe passage on the voyage in question.

There was ample information aboard the "NICOLAOS S. EMBIRICOS" available to Captain Koutsoukos to have warned him of the dangers the vessel would meet on her course to and through the One and a Half Degree Channel.

In *Savannah Sugar Refining Corp.* v. *Atlantic Towing Co.*, 15 F.2d 648, 651 (5th Cir. 1926), the Court said:

> • • • We think that the evidence calls for the conclusion that the stranding was due, not to a failure to supply the vessel with charts or other publications giving information required for the proper navigation of her on the voyage in which she was engaged, but to the failure of her master to make proper use of information which was available to him, and to take reasonable precautions to avoid a danger which a reasonably skillful and diligent navigator, situated as he was, would have realized in time to avoid it.

At p. 6 of its Brief Cargo lists certain nautical publications on board the vessel. Cargo labors to create the impression that the Owners of the "NICOLAOS S. EMBIRICOS" equipped the ship with nautical publications when the ship was built in 1958 and that Owners let it go at that. But this is not true. Captain Koutsoukos testified that the Owners "never refused to supply me any chart" (143a). An examination of Exhibit 35, containing invoices for numerous charts and navigational publications supplied to the vessel in 1968 and 1969 alone, refutes the impression Cargo seeks to create. For example, Cargo notes at p. 6 of its Brief that the vessel's British current

chart was based on observations made for the years 1910 to 1934. But the American current chart (Exh. L) bears the legend:

> "SOURCE OF INFORMATION
>
> The information relating to monthly surface currents shown on this chart was compiled from observations made during the month for *all years prior to 1935* by the co-operating observers of the Hydrographic Office."

In short, though differently displayed, the information contained on the current chart which Cargo itself regards as the most up-to-date is based on observations of the same vintage as those on which the chart carried on the "NICOLAOS S. EMBIRICOS" were based. Once again, a factor is put forward as an apparent deficiency which had nothing whatever to do with the stranding. Cf. *The Temple Bar*, 137 F.2d 293 (4th Cir. 1943); *Middleton & Co. (Canada), Ltd.* v. *Ocean D. S.S. Corp.*, 137 F.2d 619 (2d Cir. 1943) *cert. denied* 320 U.S. 803 (1944).

In *The Maria* (*Gladioli* v. *Standard Export Lumber Co. Inc.*), 91 F.2d 819 (4th Cir. 1937) and *The Maria* (*Atlantic Mut. Ins. Co.* v. *Cosulich Societa Triestina*), 15 F.Supp. 745 (S.D.N.Y. 1936), cases arising out of the same disaster cited by Cargo at pp. 28 and 29 of its Brief, the shipowner argued that charts and other navigational materials are pertinent to navigation, not to seaworthiness (91 F.2d 819, 821). It is not so argued here. Owners have an obligation to send their vessels to sea with sufficient information to permit navigators to avoid danger. The cases cited arose under the Harter Act, 46 U.S. Code §§ 190-196, which requires only a showing of *any* unseaworthiness resulting from lack of due diligence in order to deprive a shipowner of the error in navigation or management exception, and not unseaworthiness causing the disaster. Nevertheless, in the cases cited, the result would have been the same under

COGSA, because it was found that the navigators had in fact been misled by grossly inaccurate charts. That is not the case here.

The W.W. Bruce—The San Vincente (*Weyerhauser Timber Co.* v. *Continental S.S. Co.*), 94 F.2d 834 (2d Cir. 1938), cited by Cargo at p. 29 of its Brief, involved a collision. The issue as to the shipowner's right to recover from the owners of cargo carried on its vessel under the both-to-blame collision clause was not reached because the ship was found unseaworthy with respect to her charts, and the unseaworthiness was found causally related to the collision. The vessel was out of position in a channel because her navigators did not know that certain channel marking buoys had been renumbered. Owners certainly would not take exception to the findings in *The W.W. Bruce—The San Vincente* case, particularly since there was a strong odor of perjury emanating from the testimony of the navigators of one of the vessels there involved.

Cargo's expert, Captain Laister, concluded that the condition of the vessel's charts, compasses and electronic navigational equipment had "no actual bearing on the stranding" (Exh. I, p. 10, p. 12).

Although in the District Court Cargo vigorously disputed the condition of the vessel's radar, that contention has apparently been abandoned. Cargo instead contends, in Point V of its Brief, that the absence of a notation concerning radar returns in the Maldives by one vessel, H.M.S. "SCARBOROUGH," was the cause of the stranding of the "NICOLAOS S. EMBIRICOS". Cargo states, at p. 3 of its Brief:

> "The District Court found . . . that the ship's master did not know that the Maldivian Atolls provided good radar targets . . ."

The District Court made no such finding. The Court found (99a):

> "If the vessel had not, for the reasons mentioned above, been off course it would have reached a point, at the time of the actual stranding, which was well out to sea in the channel and where the use of radar, as with the master's previous voyage through the channel, would not have been necessary to proper navigation."

Cargo states at p. 27 of its Brief, for whatever reason it is difficult to say:

> "Captain Koutsoukos was so imbued with the importance of navigation data . . . that he was able to recall . . . approximately one year after the grounding that it was contrary to Maldivian law to give gifts to Maldivian natives."

But Captain Koutsoukos' response was to a leading question by Cargo's counsel, and he replied not so much on the basis of what he read in the "Pilot" but on the basis of what he had actually observed after the vessel took the strand. The question and his answer were as follows (163a):

> "Q. You remember reading the inhabitants of the Maldives are not permitted to accept any gifts without the sanction of the Sultan and this order is enforced by the head of the villagers. A. Yes, and I noticed that when the boats were coming alongside the Ship they refused any gifts from us."

In fact the Master, and all on board, were under the impression that the vessel was at least 20 miles from the nearest point of land (153a). Hence, Cargo's submission, at p. 28 of its Brief, "had the 1961 edition been on board the ship Captain Koutsoukos . . . would have used radar . . ." is what the District Court characterized it as—speculation (92a).

It should be noted that the information in the 1961 "Pilot" concerning radar returns does not indicate where in the Maldives, which are strung out over 500 miles of ocean and which vary in height, the observations were made. Nor does it indicate the weather conditions obtaining at the time, although such conditions of course have substantial effect on radar reception.

Assuming, *arguendo,* however, that if the radar had been turned on, a return would have been received and the stranding prevented, that does not establish *ex post facto* that the "NICOLAOS S. EMBIRICOS" was unseaworthy at the commencement of the voyage, or that her Master or crew were incompetent. There was a perfectly rational reason for the radar not being on—it was believed that the vessel had already cleared the Channel—and it had nothing to do with the lack of a radar notation in the "Pilot" on board the vessel.

It is not disputed that radar will pick up land objects. Indeed Counsel offered to so stipulate at trial (T.M. 169). That, however, does not establish that the lack of a notation to that effect in the "Pilot" caused the stranding.

Cargo concludes Point V of its Brief (p. 31) by asserting an alleged inconsistency in the District Court's opinion. Cargo states:

> The District Court is inconsistent. Either the master was incompetent and the vessel owner is therefore at fault for failing to furnish cargo with a seaworthy ship, or the vessel owner's failure to furnish its vessel with the latest governmental publications rendered the ship unseaworthy. The District Court can not have it both ways.

But there is no inconsistency. Cargo's statement is neither factually, logically nor legally correct. At the commencement of the voyage the "NICOLAOS S. EMBIRICOS" was adequately equipped with the necessary nautical publica-

tions. The single reference to radar returns, self-evident as it is, in a subsequent volume of the "Coast Pilot" would not have influenced the Master, or anyone else, to turn on the radar. It was not causally related to the stranding in any way. The Master was competent, the vessel was seaworthy, and Owners were properly exonerated from liability under the express provisions of COGSA.

POINT IV

The Master's selection of a course, if it was an error, was an error in the navigation or management of the vessel and the owner was properly exonerated from liability for its consequences.

Under Point VI of its Brief (p. 31) Cargo raises, *for the first time,* the argument that the Master's selection of a course, if it was in error, was not an error in the navigation or management of the vessel. The point was not raised, pressed, briefed or considered below, and should not be considered on this appeal. *Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941); *Publicity Building Realty Corp.* v. *Hannegan,* 139 F.2d 583, 587 (8th Cir. 1943); *Lansing B. Warner, Inc.* v. *Lehigh Valley R. Co.,* 75 F.2d 483, 485 (2d Cir. 1935); *Stanley* v. *United States,* 245 F.2d 427, 435 (6th Cir. 1957). In any event, the contention is invalid and affords no basis for reversal.

The Carriage of Goods by Sea Act exonerates the carrier for errors ". . . in the navigation or in the management of the ship". (46 U.S. Code § 1304(2)(a)). Determination of the course to be followed lies at the very heart of "navigation"; a vessel does not normally sally forth from port and then decide which way to go. The general determination as to the course to be followed is always made before the vessel leaves port, but that does not make the determination "non-navigational".

In *Hanson* v. *Haywood Bros. & Wakefield Co.*, 152 Fed. 401 (7th Cir. 1907), a Harter Act case, a vessel proceeded to sea in the face of storm warnings and cargo was subsequently lost at sea. In reversing a District Court decision in favor of Cargo, the Court of Appeals stated (at pp. 402-403):

> Under the express terms of the statute, the assumed fault in prosecuting the voyage is not attributable to the seaworthy vessel or her owners, as it relates alone to the management and navigation of the vessel. The Silvia, 171 U.S. 462, 466, 19 Sup.Ct. 7, 43 L.R.A. 241; The Wildcroft, 130 Fed. 521, 65 C.C.A. 145, affirmed 201 U.S. 378, 26 Sup.Ct. 467, 50 L.Ed. 794; The Etona, 71 Fed. 895, 18 C.C.A. 380; The Guadeloupe (D.C.) 92 Fed. 670. The numerous decisions cited in support of the decree are plainly distinguishable, having reference to the lading and care of the cargo, apart from the navigation, and are inapplicable to the negligence alleged in this libel. *The master has entire charge of the navigation of the vessel, which includes the time and manner of leaving port, equally with the course of sailing and the sail to be carried.*

Cargo alleges that the selection of a route to be followed is "within the control of the vessel owner" (Cargo's Brief p. 33). In some cases it may be. But the Owner has no power to compel the Master to maintain that course if the Master determines it to be unsafe. Indeed, in most cases it is the Master who determines the course to be followed. Captain Maiden, Owners' expert, testified (p. 244a):

> Q. In your fleet who determines which route will be taken? A. The master.
>
> Q. The master? A. The master.

In this case the master chose the course on the basis of his previous experience on an eastbound transit. The course was not set or controlled by the Owners.

Neither *The Wildcroft*, 201 U.S. 378 (1906), nor *Trustees, etc. of the Town of Brookhaven* v. *Smith*, 98 App. Div. 212, 90 N.Y.S. 646 (2nd Dept. 1904), reversed 188 N.Y. 74 (N.Y. 1907), cited by Cargo, involved navigation *per se*. The two British cases cited are similarly inapposite.

In *C. Wilh. Svenssons Travardaktiebolag* v. *Cliffe Steamship Co.*, [1932] 1 K.B. 490, Owners were exonerated from liability to Cargo under a charter party provision excepting damages caused by "accidents to hull". Cargo was lost while loading when the vessel listed and bulwarks gave way, permitting deck cargo to fall overboard. The definition of "navigation" contained in the opinion was pure dictum. The entire penultimate paragraph of the opinion (of which Cargo cites only one sentence in its Brief, at p. 35) reads as follows:

> "That renders it unnecessary for me to consider further the submission of Mr. Le Quesne, which I merely mention so that, if necessary it may be open to him, namely, that the words 'accidents of navigation' apply. There is a good deal to be said for that argument, but, in my judgment, the word 'navigation' in this connection ought to be limited to matters done in the handling of the ship, in what is naturally called navigation, that is to say when she is under way." (p. 500)

The loading of the vessel had nothing to do with navigation, nor was the Court's definition of "navigation" considered in the context of a decision as to the course to be followed.

In *President of India* v. *West Coast Steamship Company*, 213 F.Supp. 352 (D.C. Ore. 1962) aff'd per curiam

on opinion below 327 F.2d 638 (9th Cir. 1964), cert. denied 377 U.S. 924 (1964) a Shipowner was exonerated from liability for losses arising out of a stranding in the Philippines, the Court stating (at p. 358):

> The evidence shows that the Master traversed a recognized steamer route and had the same knowledge of the problems of that route as had the respondent. It is a general rule that where an owner has appointed a competent Master, such owner is entitled to rely on the Master's judgment in the navigation of the ship and should not hamper the further exercise of his judgment with instructions and orders. The G. K. Wentworth, 67 F.2d 965 (9 Cir., 1933); Denholm Shipping Co. v. Hedger, 34 F.2d 572 (2 Cir., 1929); The Oritani, 40 F.2d 522 (3 Cir., 1929). There is nothing in the record which would indicate that the respondent was under a duty to give specific or other directions to the Master to sail the ship north of Luzon. Substantial evidence would indicate, and I find, that a ship taking that route would encounter dangers just as great as a ship taking the regular steamer route through the Sulu Sea. Even the clarity of hindsight is of no help to respondent on this charge.

See also *Luria Bros. & Co.* v. *Eastern Transp. Co.*, 89 F.2d 900 (2d Cir. 1937); *The Terne*, 64 F.2d 502 (2d Cir. 1933), *cert. denied* 290 U.S. 635 (1933).

In *S.S. Lord (Owners)* v. *Newsum, Sons and Company, Limited*, [1920] 1 K.B. 846, cited at p. 34 of Cargo's Brief, a vessel under charter was to proceed from Liverpool to Archangel during World War I. Because of the presence of submarines, the route was prescribed by the British Admiralty and the Norwegian Insurance Association and lay well off the Coast of Norway. The Master, however, as Vardoe, where the crew refused to go any further and elected to proceed along the Coast of Norway and got as far

the voyage was abandoned. It was held that the Owners were not protected by the "general exceptions clause" of the charter party because the Master had failed to follow the prescribed wartime route and had failed "to prosecute his voyages with the utmost despatch," as required by the charter party. Hence, the Court's definition of "navigation" was unnecessary to the decision.

In *Isbrandtsen Co., Inc.* v. *Federal Insurance Co.*, 113 F.Supp. 357 (S.D.N.Y. 1952), aff'd *per curiam* on opinion below, 205 F.2d 679 (2d Cir. 1953), *cert. denied* 346 U.S. 866 (1953), a vessel stranded due to the master's negligence while "shifting" between Pearl Harbor and Honolulu. Cargo declined to contribute in general average, claiming that the exceptions of COGSA could not apply, as the voyage had not yet commenced. The Court, however, held that the exceptive provisions of COGSA were not limited to events occurring after commencement of the voyage, and required Cargo to contribute in general average.

In nearly every stranding case the stranding could have been prevented had another course been chosen. The choice of a course, however, is peculiarly within the province of the Master. Where, as here, the Master has been provided with the necessary information to enable him to set his course, any error made by the Master in doing so cannot cast the Owner in liability.*

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* It is important to note that during nearly all of the transit, the course of the "NICOLAOS S. EMBIRICOS" was paralleled by an unidentified vessel approximately four miles to starboard (Koutsoukos Dep. p. 43 Q. 475; 157a). The route taken was a recommended route during April and October and the "NICOLAOS S. EMBIRICOS" commenced her voyage in early May. Hence, the Master's selection of a course through the One and a Half Degree Channel, based on his previous eastbound transit, while termed a "basic error" by the District Court (89a), was in no sense an aberration, nor was the general route selected, *per se*, the cause of the stranding.

POINT V

No frustration of the voyage vitiated cargo's contractual obligation to pay freight.

Point VII of Cargo's Brief is addressed to Charterers, and Owners are not required to reply thereto. It is sufficient to note that where a contract itself provides for an allocation of risks upon the occurrence of certain events (*e.g.*, where freight is payable "vessel and/or cargo lost or not lost") the doctrine of frustration cannot be applicable. *Transatlantic Financing Corp.* v. *United States*, 363 F.2d 312, 315 (D.C. Cir. 1966); *The Glidden Co.* v. *Hellenic Lines, Ltd.*, 275 F.2d 253, 255 (2d Cir. 1960); *United States* v. *Buffalo Coal Mining Co.*, 345 F.2d 517, 518 (9th Cir. 1965).

CONCLUSION

The District Court correctly held that the losses arising from the stranding of the "NICOLAOS S. EMBIRICOS" were caused by errors of the Master in the navigation and management of the vessel, and that no element of unseaworthiness caused or contributed thereto; accordingly, Compania Naviera Epsilon, S.A., as owners of the "NICOLAOS S. EMBIRICOS", were properly exonerated from liability under the Carriage of Goods by Sea Act. The judgment of the District Court dismissing the cargo claims and the claim for a refund of pre-paid freight should be affirmed, but the judgment should be reversed to the extent that it awarded charterers their legal expenses. Compania Naviera Epsilon, S.A. should be awarded costs against all other parties to the appeal.

Respectfully submitted,

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